SC83875

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

vs.

BRUCE D. THOMPSON,

Appellant.

Appeal from the Circuit Court of Jackson County, Mo.
16th Judicial Circuit
The Honorable Justine E. Del Muro, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This is an appeal of convictions by a jury in the Circuit Court of Jackson County of one count of murder in the second degree in violation of §565.021.1,[1] and one count of armed criminal action in violation of §571.015. Appellant was sentenced by the Honorable Justine E. Del Muro to life imprisonment for murder in the second degree and to fifteen years' imprisonment for armed criminal action, with the sentences ordered to run consecutively (Tr. 839).

Appellant's convictions and sentences were affirmed by the Missouri Court of Appeals, Western District (en banc) on June 5, 2001. On September 25, 2001, this Court granted post-opinion transfer pursuant to Rule 83.04. Jurisdiction therefore rests in the Missouri Supreme Court.

[1]All statutory citations are to RSMo 1994 unless otherwise indicated.

STATEMENT OF FACTS

Appellant was indicted by the grand jury of Jackson County on one count of murder in the second degree in violation of §565.021.1 and one count of armed criminal action in violation of §571.015 (L.F. 3-5). Appellant was subsequently charged by amended information as a prior offender with previous convictions for robbery in the first degree and assault in the first degree (L.F. 7-9). Appellant was tried before a jury in the Circuit Court of Jackson County, the Honorable Justine E. Del Muro presiding, on May 24-27, 1999. Viewed in the light most favorable to the verdicts, the evidence and reasonable inferences therefrom establish the following facts:

Appellant was the live-in boyfriend of the victim, Lynn Thompson (Tr. 243).[2] The victim lived with appellant at 7417 College, along with their daughter Raylynne (an infant) and Lynn's children by a previous relationship, Wesley and Sharday (Tr. 243).

Wesley Joseph McLaughlin (Joe) was the father of Wesley and Sharday and the high school sweetheart and former live-in boyfriend of the victim, Lynn Thompson (Tr. 242). Joe and Lynn had worked out a visitation schedule whereby Joe had the children every other weekend (Tr. 242). In order for Lynn to avoid problems with appellant, they arranged that Lynn

[2]While both appellant and his victim bore the last name of Thompson, they were not related by blood or marriage.

would drop the children at Joe's house on Friday evening or Saturday morning and Joe would return them to Lynn's mother's house on Sunday evenings (Tr. 244-245). Betty Thompson was Lynn's mother and is the grandmother of Wesley, Sharday and Raylynne (Tr. 242).

During the month of July 1997, Lynn and the children left appellant and went to live with Lynn's mother (Tr. 316). After a week, Lynn and appellant reconciled, and they moved back in with appellant (Tr. 316-317).

On the weekend of September 20-21, 1997, Joe had the children and dropped them off at Betty's home between 6:00 and 6:30 p.m. on Sunday night (Tr. 245-246, 257). September 20 was also Lynn's birthday (Tr. 303). Lynn worked at her job at Plastics Sales on her birthday (Tr. 303). Appellant was unemployed (Tr. 303).

After work on her birthday, Lynn stopped by Betty's house and had a sandwich with Betty and with Lynn's brother (Tr. 304). Raylynne was present (Tr. 304). Appellant was not present for the dinner, nor were her other children, who were with Joe (Tr. 304).

When Lynn left after dinner on Saturday, she told Betty she was going home (Tr. 304). Betty asked Lynn to take her to the store on Sunday because Betty did not drive (Tr. 305).

Lynn arrived on Sunday in her Buick, which was a brown four-door (Tr. 305). However, her car was low on gas and Betty suggested they take her brother's car, which was a white four-door Pontiac (Tr. 305). When they got back from shopping, Lynn had some clothes which she intended to take to a laundry to dry because although she had a washer, she did not have a dryer (Tr. 306). Lynn took the clothes out of the brown car and put them in the white car and said she was going to drive to a location at Wornell and 84th Street (Tr. 249-250, 306). She was then

going to pick up the baby and come back to Betty's house (Tr. 306). Lynn left about 2:30 and never returned (Tr. 306-307).

When Lynn did not appear, as she always did, to pick up the children on Sunday night, the children and Betty called Joe, who had not heard from her (Tr. 246, 258). At Betty's request, Joe picked up one of the children, Sharday, and drove by Lynn and appellant's house looking for a car (Tr. 247). Joe did not stop out of respect for the agreement he had with Lynn whereby he would not "go by their house" (Tr. 247, 258). Sharday noticed a light flickering in the back bedroom, which she said was the TV but they saw no other lights in the house (Tr. 247).[3] Joe stopped at a couple of friends' house and then returned Sharday to Betty's (Tr. 247, 262-263).

Lynn would always arrive between 6:00 and 7:00 p.m. to pick up the children at her mother's on Sundays and had never missed a time (Tr. 248). However, because Lynn had not had a chance to celebrate her birthday, the group decided Lynn might be out celebrating her birthday (Tr. 248).

By early Monday morning, when Lynn had still not picked up the children, they called Joe and told him that she had not shown up and that they needed to be picked up because Wesley needed gym clothes for school (Tr. 248, 259). After calling in at work, Joe took Wesley by Lynn's house, where Wesley walked around the house and knocked on and checked the doors, which were locked (Tr. 248, 249, 259-60, 263). They also went to the window

[3]The back bedroom was the one shared by appellant and Lynn.

where the TV was flickering and yelled out the names of Lynn, appellant, and Raylynne (Tr. 248-249), but no one answered (Tr. 249). No car was parked in front of the house (Tr. 249). They couldn't see into the garage because the glass on the door was painted (Tr. 249).

Joe took Wesley back to Betty's house and Betty told him that Lynn said she was going to a laundromat at 84th and Wornell (Tr. 249-250). After searching unsuccessfully at the laundromat and at a relative's, Joe and Betty contacted the police and asked if they would check on her welfare as it was not in her character not to be there to pick up the kids (Tr. 250, 253-264).

There were only two functioning doors into the house, the front door, which had a deadbolt, and the door inside the garage (Tr. 271-272). The outside garage door required a key to get inside (Tr. 272). The inside garage door also had a turn lock (Tr. 272). There was a back door at the back of the garage but it had a board across it and could not be used to get in or out (Tr. 273). The outer garage door was usually kept locked and the only people with keys were the victim and appellant (Tr. 293). Only appellant and the victim had keys to the house (Tr. 273). There was no spare key (Tr. 273). When Wesley checked, both the front and garage doors were locked (Tr. 287).

Once police arrived, Wesley (with Joe's permission) agreed to dislodge a screen and enter a window to unlock the front door for them (Tr. 251-252, 264, 269-270). After Wesley went inside through the window, he unlocked the door by opening the deadbolt (Tr. 288-289). While Wesley was inside, he noticed an unusual mess on the kitchen floor, with spaghetti, a bowl, and a spoon on the floor (Tr. 290). This was unusual because the victim insisted on a

clean house (Tr. 276). There was a bucket in the living room with shoes which looked like the victim's (Tr. 293-294). There was not usually a bucket in the living room (Tr. 294).

While searching the house (with Wesley's permission), police found no one on the main floor, but a television set was on in the victim and appellant's bedroom (Tr. 225, 275, 338-339). Police discovered the messy spill on the kitchen floor (Tr. 225). The Pontiac was parked in the garage, although the victim always parked it in the driveway except when unloading groceries (Tr. 225, 274). The keys to the white Pontiac were found on top of the TV in the living room a couple of feet away from the door leading out to the garage (Tr. 275).

In order to get to the garage, one had to go through the kitchen (Tr. 270-271). To get to the basement, one had to go through the garage to a basement door (Tr. 271). There was also a door at the bottom at the basement steps that led into the basement (Tr. 271). After officers went through the garage to the basement, they found a broken pipe in the basement with water spilling out (Tr. 233).

After searching various portions of the basement, officers found the victim, Lynn Thompson, dead under a sheet in what they at first had thought was a pile of clothes in the entryway to the washing machine area (Tr. 226-227, 357). Lynn died as a result of two stab wounds to her right breast, either of which would have been fatal (Tr. 616-17, 622). In addition, she had a stab wound to her abdomen and five defensive wounds on her arms, hand, and leg (Tr. 618-19, 622-623). In addition, there were cuts, scrapes, and marks on her neck which appeared to be caused by fingers (Tr. 623-624, 640). Her body was found in a pool of blood (Tr. 357). There was blood spattered on the wall directly behind her and on some boxes

next to her (Tr. 358, 391). There were bloody shoeprints on contact paper underneath the body and on portions of the basement steps (Tr. 354, 358-59, 500). The bloody shoeprints under the victim's body and leading away from the body were "very large bloody shoeprints. . ." (Tr. 655-656).

In the washing machine room, police found the victim's purse and its contents strewn on the floor (Tr. 236, 360). Pieces of freshly broken wood were found on the floor, and there were drops of blood on the board and furnace duct (Tr. 360-361). One of the victim's earrings lay on the floor by the washing machine (Tr. 361).

In addition, there was blood on the back of the basement door at the bottom of the basement steps and on the back doorknob (the side facing the inside of the basement) (Tr. 355). Shoeprints left in a white chalky substance on the step into the garage appeared to have been made by the victim's shoes, but did not match the tread of the bloody shoeprints (Tr. 347, 406, 606-607, 669-670). Police also found drops of blood on the bathroom floor, a trash bag in the bathroom of the trash can, the kitchen floor, a metal bracket in the doorway between the kitchen and the garage, the step into the garage, on the floor in front of the car, a trash bag in the garage near the railing leading down to the basement, near the rear bumper of the car, on the landing at the top of the basement stairs, and on a board and on the furnace duct in the washing machine area of the basement (Tr. 341-342, 344, 346, 348-49, 360-361, 399-400).

DNA testing revealed that five blood samples (from the basement doorknob, two spots in the garage, the bathroom floor, and the bathroom trash bag, respectively) matched appellant's DNA profile, which is present in only 1 in 166,666,000 people (Tr. 680, 683). The blood on

the furnace duct matched the victim's (Tr. 683).

Lynn was last seen by a neighbor washing the Pontiac with Raylynne in the driveway in the late afternoon on Sunday, September 21 (Tr. 448, 450). Lynn would always arrive between 6:00 and 7:00 p.m. to pick up the children at her mother's on Sundays and had never missed a time (Tr. 248). At approximately 7:00 p.m., this same neighbor saw appellant leave the house with Raylynne, drive off in the Pontiac, return ten to fifteen minutes later, leave again in his Volvo, return again ten minutes later, and leave five minutes later with a black duffel bag which he placed in the trunk of the Volvo before driving off (Tr. 451-455, 460). At approximately 8:00 p.m., appellant dropped Raylynne off at his sister Edwinna's house and asked her if she would babysit Raylynne while he "made a run" (Tr. 512-513). Appellant was supposed to be back in a few minutes (Tr. 518). Appellant never returned to pick up Raylynne (Tr. 513-514). After hearing of and then watching a local television news broadcast the next day concerning Lynn's death, which advised that the police were looking for Raylynne and appellant, Edwinna contacted the police (Tr. 516-517, 547-548). Police searched appellant's Volvo, which was abandoned outside Edwinna's house, and found a pager in the car (Tr. 484, 515). The victim did not have telephone service at the time of her death and relied upon her pager when people were trying to contact her (Tr. 303). Luminol testing revealed what was presumptively blood on the steering wheel, front left seat, and front left rocker panel of appellant's car (Tr. 485-486, 657). The crime laboratory subsequently could not identity the presence of blood on these items (Tr. 656, 691).

Detectives had reason to believe that appellant may have gone to the residence of his

brother, Gregory Thompson (Tr. 586-587). Gregory Thompson confirmed in an interview with a detective on September 25 (four days after the murder) that he had had contact with appellant since the homicide (Tr. 586). A search of the house of Gregory Thompson resulted in the discovery of a large knife (Tr. 582-583, 657). Hemostix testing of the knife resulted in "a fairly significant reaction for the possible presence of blood" (Tr. 657).

Appellant did not surrender to police until November 10, 1997, some 50 days after the victim was killed (Tr. 557). Appellant had been informed by Edwinna that police were looking for him within a couple of days of her statement to police, which had taken place on September 23 (Tr. 518, 521). Police noted apparent scars, lacerations and scratching on appellant's hands, which were photographed (Tr. 562-564, 579).

Appellant declined to testify at trial and called no witnesses. Appellant's case consisted only of stipulations that appellant was not the beneficiary of the victim's life insurance or profit sharing plans (Tr. 722-23).

The jury found appellant guilty as charged (Tr. 316). Appellant was sentenced by the court as a prior offender to life imprisonment for murder in the second degree, and to fifteen years' imprisonment for armed criminal action, with the sentences ordered to run consecutively (Tr. 838-839).

Appellant was sentenced on July 16, 1999 (Tr. 822). Appellant's notice of appeal was filed on July 20, 1999 (L.F. 55-57). The Court of Appeals, Western District, sitting en banc, affirmed the convictions and sentences on June 5, 2001.

This Court granted transfer on September 25, 2001. This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S MOTION FOR JUDGMENTS OF ACQUITTAL, ACCEPTING THE GUILTY VERDICTS, AND SENTENCING APPELLANT BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO CONVICT APPELLANT OF MURDER AND ARMED CRIMINAL ACTION IN THAT ONLY APPELLANT HAD A KEY TO THE LOCKED HOUSE, APPELLANT LEFT A TRAIL OF HIS BLOOD LEADING AWAY FROM THE BODY, APPELLANT WAS SEEN LEAVING THE HOUSE MULTIPLE TIMES FOR SHORT PERIODS IN DIFFERENT VEHICLES AFTER THE VICTIM WAS LAST SEEN ALIVE, APPELLANT DID NOT CALL THE POLICE, AND APPELLANT DROPPED OFF HIS CHILD AND FLED FOR 50 DAYS IMMEDIATELY AFTER THE MURDER.

State v. Franco, 544 S.W.2d 533 (Mo. banc 1976), *cert. denied*, 431 U.S. 457 (1957);

State v. Woodworth, 941 S.W.2d 679 (Mo.App., W.D. 1997);

State v. Paige, 446 S.W.2d 798 (Mo. 1969);

State v. Grim, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING DEFENSE COUNSEL'S OPENING STATEMENT TO EVIDENCE WHICH WOULD BE PRESENTED IN THE DEFENSE CASE BECAUSE THE RULING WAS PROPER IN THAT THE DEFENSE MAY NOT MAKE AN OPENING STATEMENT BASED SOLELY ON FACTS ELICITED DURING THE CROSS-EXAMINATION OF THE STATE'S WITNESSES AND RELATING TO THE STATE'S WITNESSES' CREDIBILITY.

State v. Nelson, 831 S.W.2d 665 (Mo.App., W.D. 1992);

State v. Arrington, 375 S.W.2d 186 (Mo. 1964);

State v. Ivory, 609 S.W.2d 217 (Mo.App., E.D. 1981);

. ***State v. Williams***, 34 S.W.3d 440, 443-444 (Mo. App., S.D. 2001).

III.

THE TRIAL COURT DID NOT PLAINLY ERR OR COMMIT MANIFEST INJUSTICE BY NOT INTERVENING *SUA SPONTE* TO PREVENT THE STATE FROM ARGUING THAT THE PAGER FOUND IN APPELLANT'S CAR WAS THE VICTIM'S PAGER TAKEN BY APPELLANT AFTER HE KILLED THE VICTIM SO THAT HE COULD KEEP TRACK OF WHO WAS TRYING TO REACH HER WHILE HE WAS DISPOSING OF THE EVIDENCE OF THE CRIME BECAUSE NO OBJECTION WAS MADE TO THE ARGUMENT AND SUCH CLAIMS ARE USUALLY DENIED WITHOUT EXPLANATION BECAUSE THEY IMPLICATE TRIAL STRATEGY. IN ANY EVENT, THE ARGUMENT WAS PROPER BECAUSE THE STATE WAS PERMITTED TO DRAW REASONABLE INFERENCES FROM THE EVIDENCE AND THE EVIDENCE ESTABLISHED THAT THE VICTIM RELIED UPON THE PAGER BECAUSE SHE LACKED PHONE SERVICE AT THE TIME OF HER DEATH, YET NO PAGER WAS FOUND AT HER HOUSE. MOREOVER, THERE IS NO MANIFEST INJUSTICE IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

State v. Wood, 719 S.W.2d 753 (Mo. banc 1986);

State v. Cobb, 875 S.W.2d 533 (Mo. banc), *cert. denied*, 513 U.S. 896 (1994);

State v. Hadley, 815 S.W.2d 422 (Mo. banc 1991);

State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997), *cert. denied*, 118 S.Ct.

416 (1997).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S MOTION FOR JUDGMENTS OF ACQUITTAL, ACCEPTING THE GUILTY VERDICTS, AND SENTENCING APPELLANT BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO CONVICT APPELLANT OF MURDER AND ARMED CRIMINAL ACTION IN THAT ONLY APPELLANT HAD A KEY TO THE LOCKED HOUSE, APPELLANT LEFT A TRAIL OF HIS BLOOD LEADING AWAY FROM THE BODY, APPELLANT WAS SEEN LEAVING THE HOUSE MULTIPLE TIMES FOR SHORT PERIODS IN DIFFERENT VEHICLES AFTER THE VICTIM WAS LAST SEEN ALIVE, APPELLANT DID NOT CALL THE POLICE, AND APPELLANT DROPPED OFF HIS CHILD AND FLED FOR 50 DAYS IMMEDIATELY AFTER THE MURDER.

Appellant's first point contends that there was insufficient evidence to convict him of murder or armed criminal action. The trial judge observed at the sentencing hearing, "I sat here with that jury that found you guilty and heard all of the evidence that was presented and I believe that the verdict was correct. I think there was overwhelming evidence of your guilt" (Tr. 838).

In considering the sufficiency of the evidence in a criminal case, a reviewing court accepts as true all the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. ***State v. Grim***, 854 S.W.2d 403, 405 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993). An appellate court neither

weighs the evidence, ***State v. Villa-Perez***, 835 S.W.2d 897, 900 (Mo. banc 1992), nor determines the reliability or credibility of the witnesses, ***State v. Middleton***, 854 S.W.2d 504, 506 (Mo.App., W.D. 1993), but rather limits its determination to whether there is sufficient evidence from which a reasonable jury might have found the defendant guilty beyond a reasonable doubt. ***Grim***, 854 S.W.2d at 405.

The reliability, credibility, and weight of the witnesses' testimony is for the jury to determine. ***State v. Sumowski***, 794 S.W.2d 643, 645 (Mo. banc 1990); ***State v. Parrish***, 852 S.W.2d 426, 428 (Mo.App., W.D. 1993). A jury may believe all, some, or none of the witness' testimony in arriving at a verdict, and it alone resolves any contradictions or conflicts in the witness' testimony. ***State v. Dulany***, 781 S.W.2d 52, 55 (Mo. banc 1989). An appellate court's review is limited to determining whether a jury had substantial evidence from which to find the defendant guilty beyond a reasonable doubt. ***Dulany*** at 55. "Substantial evidence" is evidence from which the trier of fact reasonably can find the issue in harmony with the verdict. ***State v. Martin***, 852 S.W.2d 844, 849 (Mo.App., W.D. 1992). Viewed in the light most favorable to the verdict, and accepting all reasonable inferences in the light most favorable to the state, the evidence established that appellant was the only person with a key to the house besides the victim (Tr. 273). Each of the doors to the house was locked and there were no signs of forced entry (Tr. 287, 333, 337).[4] DNA testing established that appellant left a trail

[4]While appellant now suggests the killer may have crawled through a window as the victim's son Wesley did with the help of police, Wesley's entry required that a screen be

of his blood drops away from the murder scene, from the back doorknob of the basement door to the garage to the bathroom (Tr. 683-685). In the hours after the victim was left seen alive, and at precisely the time the victim was overdue to pick up her children at her mother's house, appellant was seen coming out of the house without the victim on multiple occasions and driving off multiple times in first the victim's brother's vehicle, which the victim had driven, and then his vehicle, only to return a few minutes later and then drive off again (Tr. 418, 450-451, 455, 460). Appellant then dropped their daughter at his sister's house, abandoned his car, and fled for 50 days prior to surrendering to police (Tr. 484, 512-517, 547, 548, 557). A large knife with traces of blood on it was found at the house of the brother he had had contact with in the days after the homicide (Tr. 582-583, 586, 657). Appellant did not report the victim missing or seek help for her. Appellant had not celebrated the victim's birthday the day before, even though they had lived together for years and he was unemployed (Tr. 303-304). The victim had left appellant approximately two months prior to the murder for a week (Tr. 316-317). Appellant had lacerations and scars on his hands when he surrendered (Tr. 562, 564, 579).

While appellant seeks to impose more innocent explanations for his actions and for the

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dislodged (Tr. 251-52, 264, 269, 270). Moreover, the murder took place during daylight hours and the window in question was in front of the house (Tr. 251-52).

evidence upon this Court, this attempt is in violation of the clear standard of review, which requires the evidence to be considered in the light most favorable to the state and all reasonable inferences to be drawn in favor of the state. ***Grim***, 854 S.W.2d at 405.

This evidence compares favorably with that of other cases where the evidence has been deemed sufficient. In ***State v. Franco***, 544 S.W.2d 533 (Mo. banc 1976), *cert. denied*, 431 U.S. 457 (1957), the Missouri Supreme Court found that the evidence was sufficient to support a verdict finding the defendant guilty of second degree murder. Id. The evidence in ***Franco*** was described as "almost entirely circumstantial in nature. . . . Id. at 534. In ***Franco***, the bodies of the victims were discovered by the appellant's girlfriend and two other friends under a pile of canvas awnings in the basement of the girlfriend's home in Kansas City. Id. at 534. The court noted the jury could reasonably infer from the collective impact of the following evidence that appellant committed the homicides in question: (1) appellant's access to the basement of the dwelling house where the victims' bodies were found; (2) appellant's possession of an Indian belt buckle on the afternoon of January 2, 1974 (the last day the victims were seen alive), which belonged to one of the victims; (3) the presence of appellant's fingerprint on a purse belonging to the other victim, which was found partially concealed on a rafter in the basement where the victims' bodies were discovered; (4) appellant's presence on January 2, 1974 (the last day the victims were seen alive), in the immediate area of the dwelling house where the victims' bodies were eventually found almost a month later; and (5) the fact that appellant left a message for one of the victims to call him on the morning of January 2, 1974, at the dwelling house

where the victims' bodies were found. Id. at 536.

In the case at bar, appellant had exclusive access to the basement of a dwelling house where the victim's body was found, shared only with the victim; appellant's blood was found in multiple areas leading away from the area where the victim's body was found, as established by DNA testing; appellant was not only present in the immediate area of the dwelling house but in the house itself according to the observation of the neighbor shortly after the victim was last seen alive, at the time the victim became overdue to be at her mother's, and was leaving the house; appellant dropped his infant daughter off shortly after and, although he promised to return for her, instead fled for fifty days and abandoned his car. In addition, a large knife with traces of blood on it was found at the home of the brother he had contact with after the homicide, and the victim died from multiple stab wounds.

Moreover, there was evidence that appellant's relationship with the victim was troubled. The victim had left appellant for a week two months prior to the murder. Appellant, who was unemployed, did not attend the victim's birthday dinner on the day she was killed.

This combined evidence was easily sufficient to permit a reasonable jury to reasonably infer that appellant committed the homicide in question. Id. *See also* ***State v. Woodworth***, 941 S.W.2d 679 (Mo.App., W.D. 1997); ***State v. Paige***, 446 S.W.2d 798 (Mo. 1969); ***State v. Goodman***, 608 S.W.2d 498 (Mo.App., W.D. 1980); and ***State v. Nelson***, 674 S.W.2d 220 (Mo.App., S.D. 1984).

Appellant's first point must be rejected.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING DEFENSE COUNSEL'S OPENING STATEMENT TO EVIDENCE WHICH WOULD BE PRESENTED IN THE DEFENSE CASE BECAUSE THE RULING WAS PROPER IN THAT THE DEFENSE MAY NOT MAKE AN OPENING STATEMENT BASED SOLELY ON FACTS ELICITED DURING THE CROSS-EXAMINATION OF THE STATE'S WITNESSES AND RELATING TO THE STATE'S WITNESSES' CREDIBILITY.

Appellant's second point contends that the trial court abused its discretion by limiting defense counsel's opening statement to evidence that would be presented in the defendant's case. Appellant admits the ruling is in accordance with current appellate law in Missouri. ***See, e.g., State v. Nelson***, 831 S.W.2d 665 (Mo.App., W.D. 1992); ***State v. Hamilton***, 740 S.W.2d 208 (Mo.App., W.D. 1987); ***State v. Flaaen***, 863 S.W.2d 658 (Mo.App., W.D. 1993); ***State v. Bibbs***, 634 S.W.2d 499 (Mo.App., E.D. 1982); ***State v. Ivory***, 609 S.W.2d 217 (Mo.App., E.D. 1981). Appellant seeks re-examination of the rule. Appellant relies heavily on literature advocating that argument be permitted in opening statement.

Preservation Issues

The items appellant sought to include in his opening statement at trial based on his intended cross-examination of State's witnesses were limited and did not encompass several of the examples he now urges in retrospect that he would have discussed. Moreover, appellant waived the issue by never calling (or even attempting to call) any of the witnesses during his

case-in-chief. In fact, appellant presented no case-in-chief, aside from reading a stipulation that others were the beneficiaries of the victim's life insurance and profit-sharing accounts (Tr. 722-723). Appellant chose not to include this information in his opening statement (Tr. 221).

Prior to trial, the State filed a motion in limine to limit appellant's opening statement to "evidence which the defendant expects to produce, rather than commenting on the State's evidence or witnesses." (L.F. 15) The trial court sustained the motion (L.F. 15, Tr. 186). While appellant argued that he might call other "pertinent and relevant" witnesses if the State didn't call them, including ***all*** of the police officers, detectives, and crime scene technicians he had subpoenaed, his counsel admitted at that point that she didn't "know if they're pertinent and relevant or not," (Tr. 183), and mentioned only three witnesses by name: Edwinna Thompson, appellant's sister (Tr. 182), Crime Scene Technician Van Ryn (Tr. 182-183), and Bill Newhouse, who worked for the Kansas City Crime Lab (Tr. 183, 185-186). Each was a witness subpoenaed, endorsed, and called by the State (Tr. 182, 184, 481, 509, 592). None of these witnesses were subsequently called or recalled by the defense.

While appellant contended that he had also subpoenaed the witnesses and intended to call them, the trial court observed that "these are all crime scene technicians and experts that are necessary for making the state's case. It's not the-- . . . -- it's not a fact witness that they may choose to elicit evidence from. Given that the state has the burden and is required to present that type of evidence, I can't imagine that just because you [defendant] subpoenaed them

that their witnesses are for you." (Tr. 185).[5]

Defense counsel specifically offered to mention that CST Van Ryn did testing and looked for evidence in appellant's car and didn't find anything (an inaccurate depiction of his testimony, as will be demonstrated below), that there were fingerprints submitted that did not match her client (without reference to any witness other than Van Ryn, who did not testify on this issue), and that Bill Newhouse analyzed "the prints and said they don't match any shoes that were provided to him." (Tr. 185-186).

After the Court sustained the Motion in Limine, appellant argued the action violated his due process and fair trial rights under the Fifth and Sixth Amendments, his right to subpoena witnesses, and his Fourteenth Amendment rights, as well as Article I, Sections 10, 17, and 18a of the Missouri Constitution. Appellant cited no other authority. (Tr. 186-187). Appellant did not cite Rule 27.02(f), Section 546.070(2), Article I, Section 2 of the Missouri Constitution, or his right "to appear and be defended by counsel", which are among the authorities cited on appeal. The latter grounds are therefore waived as the trial court was not given the opportunity

[5]The State's Motion in Limine further urged that the defendant could not circumvent the rule limiting openings to evidence the defense expected to produce by offering to call the State's witnesses as his own (L.F. 15-17).

to address them. A new ground for error may not be asserted for the first time in the appellate court. ***State v. Jones***,, 515 S.W.2d 504, 506 (Mo. 1974).

After the State completed its opening statement, defense counsel approached the bench and proposed to discuss two witnesses the State had not mentioned in its opening: CST Van Ryn and Newhouse (Tr. 219). Defense counsel made the following proffer: "I would like to talk about the fact that Newhouse did foot comparisons and I would like to talk about the fact that VanRyn searched the Volvo and that it didn't contain any evidence. That's what I would like to tell them." (Tr. 219). Defense counsel's proffer at trial mentioned no other witnesses or evidence, including no fingerprint evidence and no proffer concerning Edwinna Thompson (Tr. 219). Appellant has thus waived all claims concerning his opening statement except those in which he proposed to state that Van Ryn searched the Volvo "and that it didn't contain any evidence" (an inaccurate, as well as argumentative depiction of his testimony) and that Newhouse did foot comparisons (which were of questionable significance since appellant presumably disposed of the bloody shoes worn the night of the crime).[6]

Defense counsel then gave the following opening: “There’s much more; there’s much more. We ask you to wait, listen, and then decide. The evidence will not add up, so you will

[6]The prosecutor committed to calling these witnesses on the record in a colloquy at the bench between its opening statement and appellant’s. (Tr. 219-220)

not be able to find Bruce Thompson guilty of this offense because he is not." (Tr. 221). The prosecutor objected, defense counsel said "I'm through" and the Court sustained the objection (Tr. 221). Defense counsel did not discuss, nor seek to discuss, the evidence admitted by stipulation during the defense case concerning life insurance or profit sharing plan beneficiaries at his opening statement.

Appellant did not call, nor seek to recall Van Ryn, Newhouse, Edwinna Thompson, or any other witness during his case. To the extent appellant's real point is that he should be able to call or recall these witnesses, and thereby open on them, that point is waived by his failure to do so, which further supports the trial court's discretionary ruling that these were not genuine defense witnesses and that the attempt to open on them was a subterfuge.

General Law Governing Opening Statements

The purpose of an opening statement is to give the court and jury a general outline of the anticipated evidence and its significance. ***State v. Nelson***, 831 S.W.2d 665, 666 (Mo.App., W.D. 1992). "The opening statement of counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may be better prepared to understand the evidence." ***Best v. District of Columbia***, 291 US 411, 413, 54 S.Ct. 487, 488, 78 L.Ed. 882, 884 (1934). "The opening statement is usually only an outline of the anticipated proof and not a detailed statement [citation omitted], and a party is not confined in his evidence to the proof of facts recited in the opening statement. [Citations omitted.] Therefore, generally the opening statement is not expected to contain all or

necessarily even a major part of a party's case." ***Hays v. Missouri Pacific Railroad Company***, 304 S.W.2d 800, 804 (Mo. 1957).

Control of opening statements is within the discretion of the trial court. ***State v. Hamilton***, 740 S.W.2d 208, 211 (Mo.App., W.D. 1987). " . . . [T]he scope and manner of opening statement is largely within the discretion of the court which necessarily must rely upon the good faith of counsel in making opening statements to a jury as to material facts they intend to prove. The objective of an opening statement is to introduce the jury to the nature of the cause before them, and it may be utilized by both parties for such purpose." ***State v. Brooks***, 618 S.W.2d 22, 24 (Mo. banc 1981). The trial judge can exclude irrelevant facts and stop argument if it occurs. ***State of Hawaii v. Sanchez***, 923 P.2d 934 (Haw. App. 1996), *citing* 8A J. Moore, Moore's Federal Practice P29.1.06, at 29.1-76 (2d ed. 1996). ***See also, U.S. v. Zielie***, 734 F.2d 1447, 1455 (11th Cir. 1984).

The opening statement serves to introduce the party's case-in-chief, its witnesses, and the anticipated evidence to be adduced from each since witnesses may occasionally be called out of logical order. In the case of the prosecution's opening, the statement also serves to apprise the defendant of the contemplated course of prosecution to enable him to fairly meet the charges. ***State v. Murray***, 744 S.W.2d 762, 774 (Mo. banc), *cert. denied*, 488 U.S. 871, 109 S.Ct. 181, 102 L.Ed.2d 150 (1988).

While the prosecutor is for that reason required to make an opening statement in a Missouri criminal case, *see* Rule 27.02 (f), the defendant is not required to do so. Rule 27.02

provides that the attorney for the defendant "may make an opening statement [immediately after the prosecutor's] or it may be reserved[,]" Rule 27.02(f), and that, "[t]he attorney for defendant may make an opening statement [after the close of the State's evidence and any motion for judgment of acquittal] if it has been reserved." Rule 27.02(i). See also Section 546.070.

In contrast to closing argument, there is no constitutionally guaranteed right to make an opening statement. ***Moore v. Texas***, 868 S.W.2d 787 (Tex. Crim. App. 1993); ***Dunn v. State***, 819 S.W.2d 510, 524 (Tex. Crim. App. 1991); ***United States v. Salovitz***, 701 F.2d 17, 20 (2nd Cir. 1983); ***U.S. v. Zielie***, 734 F.2d 1447, 1455 & n.4 (11th Cir. 1984). ***See Herring v. New York***, 422 U.S. 853, 863 n.13, 95 S.Ct. 2550, 2555 n.13, 45 L.Ed.2d 593 (1974) (cautioning that constitutional right to closing argument does not imply constitutional right to oral process at other stages of trial, i.e., opening statement).[7]

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[7] While it may be error to deny a defendant an opening statement altogether, where such a statement is provided as a statutory or rule-created right, that was not what happened in this case. Appellant was permitted to make any opening statement he liked which complied with the law. The fact that he could not or chose not to do so is a comment on the

Missouri Appellate Cases

In ***State v. Arrington***, 375 S.W.2d 186 (Mo. 1964), this court affirmed a rape conviction and rejected a claim that the trial court erred in not permitting the defense attorney to say in his opening statement that the testimony would show that defendant was innocent. ***Id***. at 190. This court held the statement was argumentative. ***Id***. The court further rejected a defense claim that he should have been permitted to say that the testimony would establish that the defendant's "alleged statement" was "a fraud and a disgrace to the better-* * * portion of our police department." This court held that the trial court correctly sustained an objection that the statement was argumentative and essentially conclusory. ***Id***. at 190-191.

In ***State v. Feger***, 340 S.W.2d 716 (Mo. 1960), this court noted that, "As a general rule the opening statement should be brief and general, rather than detailed, and should be confined to statements based on facts which can be proved and should not include facts which are plainly inadmissible." ***Id***. at 724, *citing* 23 CJS Criminal Law § 1085. The court clarified that parties must act in good faith in making opening statements "as to material facts they intend to prove." ***Id***. at 725. The court further observed, "it is properly and wisely the rule that the 'scope and extent [of the opening statement] is largely within the discretion of the trial court." ***Id.***, *citing* 23 CJS Criminal Law § 1085 p. 527.

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weakness of appellant's trial case, and not a reflection of the unfairness of the court.

In ***State v. Lankford***, 565 S.W.2d 737 (Mo. App., K.C.D. 1978), the defense was not allowed to refer to the juvenile record of a prosecution witness in its opening. The appeals court affirmed, holding that counsel did not seek to outline anticipated proof or its significance "but merely sought to comment on the credibility of Thornton as a witness. This was not a proper function of the opening statement." ***Id***. at 739. The court cited ***State v. Fleming***, 523 S.W.2d 849, 852 (Mo. App., St.L. D. 1975), which held that the opening statement is designed to provide the jury with an outline of the anticipated proof and its significance and "is not to test the sufficiency or the competency of the evidence." ***Lankford*** at 739, *quoting* ***Fleming*** at 852. In ***Fleming***, the appellant attempted to state his "theory" of the case, which he defined as an "interpretation based solely upon the facts presented by the State." ***Fleming***, 523 S.W.2d at 852. The appeals court upheld the denial of this attempt. In ***State v. Ivory***, 609 S.W.2d 217 (Mo. App., E.D. 1980), a criminal defendant complained that the trial court limited his opening statement to evidence that would be adduced by defendant rather than commenting on evidence that he anticipated would be produced in the State's case. ***Id***. at 221. Counsel made an offer as to the content of the proposed statement that covered a page and a half of transcript. ***Id***. For the most part, the statement discussed and interpreted what the defendant anticipated the State's evidence would show and commented on the effect of that evidence. ***Id***. at 222. Counsel stated he would decline to make an opening if he was not allowed to include those matters proferred in his offer. ***Id***. The Court of Appeals held the proposed statement could best be characterized as argument. ***Id***. Citing ***Arrington, Feger,*** and ***Fleming***, the court

held that, "Argument is not the proper function of an opening statement." ***Id***. Control of the opening statement was within the sound discretion of the trial court and the court found no abuse of discretion. ***Id***.

In ***State v. Bibbs***, 634 S.W.2d 499 (Mo. App., E.D. 1982), the defense attorney began to outline evidence she would develop on the cross-examination of state witnesses. ***Id***. at 501. The court sustained an objection that this constituted improper opening statement and was in the nature of final argument. ***Id.*** The purpose of opening is not to test the sufficiency or the competency of the evidence. ***Id.*** Because the defense opening did not discuss the evidence it was going to produce but attempted to outline evidence favorable to the defense as it would be developed through cross-examination of the state's witnesses, the statement consisted of comments relating to the credibility of the state's witnesses. ***Id***. There was no error in limiting the defendant's opening statement to the evidence it would introduce. ***Id***., *citing* ***State v. Hurst***, 612 S.W.2d 846, 853 (Mo. App., E.D. 1981).[8]

[8]Appellant notes that the defendant in ***Bibbs*** offered to call ***all*** of the state's witnesses as defense witnesses to circumvent the Court's ruling during his opening statement. ***Id***. at 501. The defendant also complained that he should have been permitted to call the State's witnesses as his own. ***Id***. The court rejected this appeal point, holding that the defense theory was mistaken identification, that the defendant presented his case in the cross-examination of the state's witnesses, and that direct examination of those witnesses

by the defense would not have presented any further testimony that had not been presented on cross-examination. ***Id***. at 501-502. The latter point is not present in the case at bar because appellant did not attempt to call any witnesses during the defense case. Appellant thus waived the right to open on testimony he did not seek to present.

In ***State v. Harris***, 731 S.W.2d 846 (Mo. App., W.D. 1987), a criminal defendant complained that the trial court prohibited him from outlining in his opening statement favorable evidence that he expected the state to produce. ***Id***. at 847. During the defense opening, defense counsel spent two pages of transcript discussing ***without objection*** the eyewitness description of the assailant versus the description of the defendant, occasionally referencing the "State's own evidence" for portions of description. ***Id***. at 848, 850. The prosecutor finally objected to a reference the eyewitness made to a detective about the assailant being clean shaven as improper comment on evidence defendant hoped to develop through cross-examination of the state's witnesses. ***Id***. at 848-849.

The Court of Appeals acknowledged that under Missouri law, the defendant is not allowed to argue the credibility of the state's witnesses in the opening statement. ***Id.*** at 850, *citing* ***State v. Gibson***, 684 S.W.2d 413, 415 (Mo. App., E.D. 1984); ***Bibbs; Hurst; Ivory;*** and ***Lankford***. ***See also Fleming***, *supra;* Standard 7.4, Standards Relating to the Prosecution and Defense Function of the American Bar Association Project on Standards for Criminal Justice and the accompanying commentary. The court believed defense counsel had not strayed across the line into argument because defense counsel was free in a misidentification case to discuss the significance of the evidence by contrasting the defense evidence description with that of the state. ***Id***. at 850. An opening statement about the evidence of the defendant's true description would have meant nothing to the jury without reference to the contrasting evidence it could be fairly anticipated the state would put on. ***Id.***

However, this holding is dicta because the court found no error. The defense was free to prove by other evidence what the prosecution eyewitness had told investigating officers without relying on cross-examination of that state's witness. ***Id***. Moreover, there was no abuse of discretion because a reading of the defense opening statement demonstrated that counsel had made a full statement of the contrasting evidence and clearly accomplished what she had a right to do, i.e., to point out the significance of the evidence to come, prior to any objection. ***Id***. Finally, the defendant did not tell the appeals court what the trial court's ruling prevented his counsel from adding to the opening statement. ***Id***.

In ***State v. Hamilton***, 740 S.W.2d 208 (Mo. App., W.D. 1987), the Court of Appeals rejected a defense contention that sustaining an objection to his opening statement, which attempted to outline evidence favorable to him that would be developed through cross-examination of the state's witnesses, violated his rights under the 6th and 14th Amendments to the US Constitution, under Article I, §§ 2, 10 and 18(a) of the Missouri Constitution, and under § 546.070, RSMo 1978 and then Rule 27.02(d). ***Id***. at 208. The defendant had endorsed no witnesses and contended that the trial court denied him an opportunity to make an opening statement. ***Id***. The defense began its opening by saying there were two sides to every story, conceded that the crime happened, but said that didn't make the defendant responsible. ***Id***. When defense counsel began discussing the two prosecution witnesses, mentioning that one "was caught stealing," there was an objection that the statement was argumentative and that defense counsel was arguing the credibility of State's witnesses who hadn't even testified yet.

Id. The court sustained the objection and directed counsel to limit his opening statement "to what you expect the evidence to be." ***Id***. At the close of the State's case, the defense called no witnesses and defense counsel fully argued the credibility of the two state's witnesses. ***Id***. at 211.

After reviewing the case law, the Court concluded that the proffered opening statement based on what the defense would develop on cross-examination of the state's two witnesses was a matter of argument at that stage of the trial. ***Id***. at 211. The Court explained:

> It transcends the purpose of the opening statements which is to inform the court and jury what each party expects to prove by introduction of evidence in support of the charge or defense. Although where a defendant will not testify and has no other evidence or testimony there may be no basis for an opening statement on his part, the ruling does not prevent the statement of what he expects to prove as a defense if he will have evidence.

Id. at 212. ***See also Boggs v. State***, 742 S.W.2d 591, 594 (Mo. App., S.D. 1987) (no ineffective assistance of counsel for failure to make an opening statement because "the function of an opening statement has traditionally been to outline the defense case, and here there was none" and "it is difficult to see what counsel would have accomplished in an opening statement that could not have been better served in a closing argument").

In ***State v. Belcher***, 805 S.W.2d 245 (Mo. App., S.D. 1991), the appellant complained that the trial court erred and demonstrated partiality by sustaining objections to his opening

statement. ***Id***. at 252. The court found no abuse of discretion in sustaining an objection that the statement: "there is significant areas of doubt about what [K.] says" was argumentative. ***Id***. at 253.

In ***State v. Nelson***, 831 S.W.2d 665 (Mo. App., W.D. 1992), a defendant convicted of rape and armed criminal action appealed the trial court's decision to sustain the state's objection to his opening statement in which counsel attempted to outline evidence which would be developed through cross-examination of the state's witnesses. ***Id***. at 666. The defense counsel stated during his opening that while there were what appeared to be blood stains on the wall of the victim's apartment, there would be no competent evidence that those stains were, in fact, blood. ***Id***. at 666. Defense counsel further tried to state that the victim would testify that she didn't remember getting cut through most of the afternoon or evening, that she didn't remember where and when the defendant had the knife and that she didn't remember when he cut. ***Id.*** After the objection that the statement was improper argument and comment on facts the defense hoped to develop on cross-examination was sustained, defense counsel made an offer of proof in which he proposed to say that the victim did not recall when her hands were cut, did not know where what appeared to be blood came from, did not place her hands on the wall, and that at various times the defendant did not have a knife in his hands or she did not recall whether he had a knife in his hands. ***Id***.

The court held, "Litigants must not use opening statements to test the sufficiency or competency of the evidence, and they must not base their statements on what they expect or

hope to prove during cross-examination." ***Id***. The defense had attempted to argue the competency of the state's evidence and the credibility of the rape victim. ***Id***. Citing ***Hamilton,*** *supra*, the court observed that the defendant had attempted to use facts which he anticipated eliciting during cross-examination of the victim and that such anticipated evidence "is a matter of argument and improper" because "[i]t transcends the purpose of the opening statements which is to inform the court and jury what each party expects to prove by introduction of evidence in support of the charge or defense." ***Id.***, *quoting* ***Hamilton***, 740 S.W.2d at 211.

In ***State v. Woltering***, 810 S.W.2d 584 (Mo. App., E.D. 1991), a murder appeal, the defendant claimed the trial court erred in sustaining the State's objections to portions of the defense opening statement. ***Id***. at 588. Importantly, the Court began its analysis by holding, "The court has wide discretion in determining what may be argument and what is the statement of facts." ***Id***. at 588. ***See also Hamilton***, 740 S.W.2d at 211. Defense counsel had attempted to state that to understand the defendant's state of mind when he made sexual overtures to the victim, you had to understand things about the defendant and then attempted to explain how sexually abused children turn all relationships into a sexual nature. ***Woltering*** at 588. The Court held that the comment on defendant's state of mind was clearly improper argument, that it was not error to limit a defendant's opening statement to what the evidence would show, that any question of prior sexual abuse should have been related to defendant himself and the effect of that abuse on defendant, that defense counsel had presented a full statement of the case and background evidence in support of the psychiatric defense, and that the defendant was not

unduly restricted in presenting his opening statement, "especially in light of the fact that defendant could not support his defense of mental defect." ***Id***.

In ***State v. Robinson***, 831 S.W.2d 667 (Mo. App., W.D. 1992), a criminal defendant convicted of assault contended his opening statement was improperly limited when his counsel was not permitted to inform the jury that the victim used drugs; was seen by the defendant in the company of a local pimp; interfered with his job; had taken money from him; and had lied to him. ***Id***. at 670. The court held that the purpose of opening statement is informational; it is not a test of the sufficiency of the evidence but a device wherein the nature of the case, the anticipated evidence and its significance is generally presented to the court and jury. ***Id***., *citing* ***Harris***, 731 S.W.2d at 849. Defense counsel's proffered statement about the victim "is best characterized as argument and, as such, improper to opening statement." ***Id***.

In ***State v. Flaaen***, 863 S.W.2d 658 (Mo. App., W.D. 1993), the criminal defendant contended he attempted to inform the court and jury of the nature of the case and the anticipated proof and its significance when he advised the jury "to listen very carefully to exactly what Mr. Flaaen told these police officers, because it will not be as suggested...It will be that..." and that "You will hear a Mr. Simpson [prosecution witness] testify that he saw an automobile..." ***Id***. at 660. Objections to both statements were sustained. ***Id***. The defendant presented no evidence on his own behalf. ***Id***.

The Court of Appeals observed, "Most opening statements made by defense counsel when no defense evidence is to be offered will frequently result in an attack on the credibility

of the state's witnesses or argument of the facts of the case, neither of which serves the purpose of the opening statement." ***Id.***, *citing* ***Fleming***, 523 S.W.2d at 852. The Court further observed that whlie the state is obligated to make an opening statement, not only to inform the court and jury, but also to advise the defendant of the facts the state intends to prove, the same mandate is not imposed on the defendant. ***Id***. at 661. "Nevertheless, when the defense makes an opening statement, it may not take the opportunity to argue the sufficiency of the state's evidence or the credibility of its witnesses." ***Id***.

The Court held that the first statement, "it will not be as suggested" intimated an argument and the trial court did not abuse its sound discretion by considering it to be argument. ***Id***. A colloquy at the bar concerning the second objection, which pertained to counsel's statement concerning the testimony of the state's witness who observed the defendant in the parking lot of the burglarized apartment complex, revealed that the defense proposed to contrast the State's evidence with an unendorsed witness the defense said it intended to call but subsequently did not. ***Id.*** The trial court did not abuse its discretion by precluding defense counsel from commenting on the prosecution witness' testimony. ***Id***.

Similarly, in the case at bar, notwithstanding its alleged pretrial intent, the defense called no witness to support its proffered opening. The trial court therefore did not abuse its discretion. ***Id***.

Other States and Jurisdictions

Several other states have addressed issues similar to the case at bar. In ***State of Rhode***

Island v. Bleau, 649 A.2d 215 (R.I. 1994), the Rhode Island Supreme Court held that the trial court correctly limited the scope of defense counsel's opening statement to evidence that would be presented in its case in chief. ***Id***. at 217-218. In ***Bleau***, as in the case at bar, the defendant had the option to open after the prosecution opening or after the conclusion of the prosecution's case in chief. ***Id***. at 217. The defendant wished to open after the prosecution's opening but was uncertain as to whether he would present any evidence in his case in chief. ***Id***. The Court reiterated its earlier holding in ***State of Rhode Island v. Byrnes***, 433 A.2d 658, 664 (R.I. 1981) that "the proper function of an opening statement is to apprise the jury with reasonable succinctness what the issues are in the case that is about to be heard and what evidence the prosecution and the defense expect to produce at trial in support of their respective positions." ***Id***. An opening statement is not an appropriate vehicle by which to "attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present." ***Id***., *quoting* ***State of Idaho v. Griffith***, 539 P.2d 604, 608 (Idaho 1975).

In ***Griffith***, the Idaho Supreme Court upheld a trial court limitation on defense counsel's opening statement to direct examination evidence, which forbade defense counsel from commenting on the possible testimony of the arresting officer who was to testify during the prosecution's case-in-chief. ***Id***, 539 P.2d at 608. "Opening statements serve to inform the jury of the issues of the case and briefly outline the evidence each litigant intends to introduce to support his allegations or defenses, as the case may be." ***Id***. While counsel should be allowed latitude, the trial court may limit the scope of the statement in the exercise of its

discretion. ***Id***. "Generally, opening remarks should be confined to a brief summary of evidence counsel expects to introduce on behalf of his client's case-in-chief. Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present." ***Id***. ***See also Mulligan v. Smith***, 76 P. 1063 (Colo. 1904); ABA Standards Relating to the Prosecution Function and the Defense Function, § 7.4, 266-67 (1971).

The Delaware Supreme Court has held that an opening statement should not be permitted to "become an argument on the case, or an instruction as to the law of the case." ***Holmes v. State of Delaware***, 422 A.2d 338, 340 (Del. 1980).

The Louisiana Supreme Court upheld an objection sustained during the defendant's opening statement discussing the presumption of innocence and asking the jury to observe the witnesses who took the stand because it was argument relating to the State's burden of proof, the presumption of innocence, and the credibility of the witnesses and did not comply with a state rule which limits remarks to an explanation of the nature of the defense and the evidence by which he expects to establish it. ***State of Louisiana v. Bell***, 268 So.2d 610, 618 (La. 1972). ***See also State of Louisiana v. Ellwest Stereo Theatres, Inc***., 412 So.2d 594 (La. 1982).

Appellant discusses an intermediate court decision from Texas. However, in ***Norton v. State of Texas***, 564 S.W.2d 714 (Tex. Crim. App. 1978), a Texas Court of Criminal Appeals reiterated that the proper function of the opening statement for the defendant is to enable him to inform the court and jury what he expects to prove. ***Id***. at 718. The court held that since the

appellant called no witnesses, did not testify himself nor otherwise offer any evidence in his defense, the trial court did not err. ***Id***. "Appellant's counsel was not prevented from making an opening statement; the only constraint placed upon him was that he make the statement in good faith and we perceive no error in the court's ruling that the opening statement would not be made in good faith if the appellant chose to call no witnesses or present defensive evidence." ***Id***.

The case relied upon by appellant, ***Arriaga v. State of Texas***, 804 S.W.2d 271 (Tex. App. 4th Dist. 1991), is not on point. In ***Arriaga***, the defendant was denied his statutory right to deliver his opening statement after the prosecution's opening. Rather, the court insisted, in contravention of a statutory amendment, that the statement be withheld until the close of the prosecution's case-in-chief. ***Id***. at 272, 274. That was not the case in the case at bar, where appellant was repeatedly reminded he had the option to open at either time.

Moreover, the ***Arriaga*** court expressly held that, "The right at issue here does not rise to the level of a basic or fundamental right the deprivation of which destroys a criminal trial's reliability to serve as a vehicle for determining guilt or innocence." ***Id***. at 275. The court held that even such a denial of the right to open as provided by statute was subject to harmless error analysis. ***Id***. While the court did not find the error harmless in ***Arriaga***, it later did so in ***Twine v. State of Texas***, 929 S.W.2d 685, 687 (Tex. App. 11th Dis. 1996), where the court found that even though the appellant was denied the right to open after the prosecution's opening, "[t]he nature of appellant's defense was apparent from her counsel's voir dire and

from the cross-examination of the State's witnesses." ***Id***. Any error did not prejudice the decision making of the jury, which was able to properly apply the law to the facts to reach its verdict. ***Id***. ***See also Moore v. State***, 868 S.W.2d 787, 788-89 (Tex. Crim. App. 1993)("right to make an opening statement is a statutory right and not a constitutional imperative or mandate").

The Case At Bar

In the case at bar, appellant merely sought to quarrel with what were obviously State witnesses that he never intended to call, and did not call, in his opening statement. The judge did not abuse her discretion by disbelieving appellant's contention that just because he subpoenaed **all** the state's officers and crime investigators, he intended to make them defense witnesses if they were not called by the State. Nor is there the remotest chance he would have called Edwinna Thompson, his sister, who testified he abandoned his child in the hours after the crime for 50 days after claiming he was merely running an errand, abandoned his car by the next morning, and did not go to the police immediately when she discussed with him that he was wanted. The fact that she may not have noticed scratches he was obviously not advertising in the hours after the crime, but which were evident and healed by the time of arrest 50 days later, pales in comparison.

CST Van Ryn testified that Luminol testing gave a reaction which revealed the presumptive presence of what could be blood on the steering wheel, the front left seat, and the front left rocker panel (the area under the door next to the seat) of the appellant's abandoned

car. (Tr. 485-486,489-490). While appellant apparently references follow-up testing by another witness, using a different test, that could not confirm the substance was blood (but did not disprove it), had the State not called the witness, appellant certainly would not have done so. Van Ryn also testified as to the pager (inferentially the victim's) which was found in appellant's car. (Tr. 484-485)

Newhouse had nothing to offer but shoe comparisons which did not match shoes given to his lab. Since the killer's shoes were undoubtedly disposed of during the multiple trips to and from the house in the hours after the murder witnessed by neighbors, this would not have changed the outcome of the case even had the jurors heard that information a third time (as opposed to merely on cross-examination and in closing).

Appellant did not identify a witness to testify as to alleged fingerprint evidence, an issue which is unpreserved.

Lack of Prejudice

This court has previously recognized the fact "that the impact of an opening statement diminishes after introduction of evidence, instructions, and closing argument." ***Hutchison v. State***, 957 S.W.2d 757, 765 (Mo. banc 1997).[9] Empirical research on actual juries has now

[9]While appellant cites statistics outside the record that many lawyers believe 80% of jurors tend to make up their minds after opening statement, the article he cites to states, "The basis for the eighty percent statistic is nearly as mysterious as the purported effect of

confirmed this fact. Contrary to previous research, such as that cited by appellant, which largely focused on mock juries, the first empirical study of the timing of opinion formation by jurors in actual trials (authorized by the Arizona Supreme Court and conducted by the National Center for State Courts) concluded that jurors made up their minds about the case at the judicial instructions phase of the trial, after all of the evidence had been presented and the lawyers had given their closing arguments. P. Hannaford, V. Hans, N. Mott, G. T. Munsterman, *Symposium: Communicating with Juries: The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 Tenn. L. Rev. 627, 649 & n.47 (Spring 2000).

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the opening statement. Apparently, however, lawyers originally derived the number from a misinterpretation of Kalvin and Zeisel's landmark jury study, although others have since claimed to obtain similar results from their own studies or trial experiences." L.T. Perrin, *From OJ to McVeigh: The Use of Argument in the Opening Statement*, 48 Emory L.J. 107, 126 (Winter 1999). Indeed, Zeisel himself challenged the validity of the statistic in a 1988 article. *Id.* at n.104. *See* H. Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, Litigation, Summer 1988, at 17-18. *See also* ***Hydrite Chemical Co. v. Calomet Lubricants Co.***, 47 F.3d 887, 891 (7th Cir. 1995) (observing that literature about conclusiveness of opening on jury decision-making exaggerates truth). Perrin, the author of the article widely quoted by appellant, says, "it seems likely that lawyers have overstated its effect in an effort to get practitioners to pay more attention to this vital stage of the trial." 48 Emory L.J. at 126.

See also V. Hans & K. Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 Ind. L.J. 1297, 1310-13 (1993) (finding most jurors remained neutral after opening statements, identifying the absence of evidence, state of indecision, desire to resist persuasion attempts, and the importance of following judicial instructions as reasons). In the Arizona study, more than 95% of jurors reported that they changed their minds at least once as to how they were leaning, and nearly 15% changed their minds more than once. 67 Tenn. L. Rev. at 636. Only a very small proportion of jurors reported leaning or making up their minds during opening statements by the parties, and most reported changing their minds at least once during the course of the trial. ***Id***. at 650.[10]

Moreover, as the Court of Appeals held, even had there been error, in cases in which defendants have been erroneously denied the opportunity to make an opening statement, no prejudice has been found where defense counsel was able to thoroughly cross-examine the witnesses regarding the facts underlying the defense theory, emphasize the significance of those facts in closing argument, and the defense's theory was not so complex as to require

[10]Fewer than 10% of the jurors reported that they began leaning toward one side or the other during opening statements, and even fewer reported making up their minds at that early stage. 67 Tenn. L. Rev. at 636.

advance elucidation. ***See State v. Thompson***, No. WD57595 (June 5, 2001), slip op. at 17 & cases cited therein.

It is undisputed that appellant was permitted to discuss all the issues mentioned in the proffer during cross-examination and in closing argument, where they were left fresh in the minds of the jurors. The fact that the jury was not impressed by such minutiae as shoe mark comparisons to shoes worn by appellant 50 days after the crime (when the evidence tended to indicate the killer disposed of the shoes used on the night in question) in comparison with the overwhelming evidence of guilt (including the DNA blood trail, the fact that appellant was the only person with a key to a locked house with no signs of forced entry left alive, the timing of the killing which demonstrated appellant was present at the house and was the only person aside from the infant seen there, appellant's abandonment of his child and car for 50 days on the day of the killing, appellant's scars and healed lacerations on his hands at the time of the arrest, some indications of blood on a knife at his brother's house where he spent some time in the days after the killing, inferentially the victim's pager found in his car) was not the fault of the court, but of appellant.

The Problem is Imaginary Rather than Real

Appellant sets up a straw man which does not reflect the current law. Appellant assumes that a criminal defendant can never discuss anything a witness endorsed or presented by the prosecution may say, in the defense case or on cross-examination. That is not what happened in the current trial and it is not the law. In the case at bar, the judge made a proper discretionary call that the defense did not intend to call the witnesses it sought to open on and that they were

not defense witnesses who would be called if the prosecutor did not call them. The judge called appellant's bluff, reminding him he could open prior to his case-in-chief and discuss such witnesses if in fact the prosecutor did not call them and he seriously intended to call them. Naturally, appellant declined to do so because the witnesses were harmful rather than helpful to his case. He did not intend to call them and did not in fact recall them.

It is a familiar refrain of defense lawyers to stipulate that prosecution witnesses will be "subject to recall." Indeed, a defendant has the constitutional right to subpoena and call any witnesses of his choosing during the defense case. This is often done. ***See, e.g., State v. Williams***, *infra.* If a witness is truly part of the case of both sides, the defense may discuss the evidence they intend to present during their case during their opening statement. Should the parties choose to stipulate for convenience sake that this material may be covered on cross-examination, they may do so. ***Bibbs*** does not hold otherwise–***Bibbs*** merely held that the defense needn't be allowed to recall a witness to give testimony that has already been given during the State's case.

Policy Considerations

The present rule is buttressed by sound policy considerations. As one prominent commentator has observed, our system "has no place for argument that precedes the introduction of evidence." S. Lubet, Modern Trial Advocacy 338 (1993). As Francis Wellman observed in his classic treatise on the art of advocacy, "An advocate should never argue in his opening; there is nothing yet to argue." F. Wellman, Day in Court 138 (1914). Jurors are forbidden from discussing the case with each other before formal deliberations begin and are

instructed not to form opinions about the case before they deliberate. To permit direct comparisons of the opposing cases in opening statement is to tempt jurors to jump to conclusions prior to the introduction of any evidence.

While anticipated cross-examination testimony is less likely to be excluded in civil cases, this is largely because there is more discovery and "the opponent has committed itself . . . to presenting certain evidence at trial." T. Mauet & H. Wolfson, Trial Evidence 39-40 (1997). In criminal cases, where depositions are a rarity, openings based on cross-examination testimony are likely to be speculative at best. They may frequently involve wishful thinking or manipulation, hoping the jury will remember the opening statement version urged by the defense rather than the evidence as it subsequently comes in.

Perhaps more importantly, there is a right to recall prosecution witnesses in a criminal case that does not exist in a civil case. For an example of where such recall was permitted, ***see State v. Williams***, 34 S.W.3d 440, 443-444 (Mo. App., S.D. 2001)(victim recalled in defense case-in-chief). Thus, the defense is not stymied from opening on witnesses called by the State where it actually intends to call those witnesses as part of its case.

Another key difference between civil and criminal cases, however, would make a rewrite of the rule a slanted and one-sided approach. The State may not presume the defendant will testify in a criminal case and may not call him if he elects not to do so as the plaintiff may do in a civil trial.[11] Thus, the rule appellant advocates is a completely one-sided one which

[11]In fact, at least one appellate case has held that the State may not open on a

would benefit criminal defendants while handcuffing the State. Indeed, should the State open

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defendant's post-arrest silence even where it knows the defendant plans to testify and the defendant does so. ***State v. Graves***, 27 S.W.3d 806 (Mo. App., W.D. 2000). This case should be expressly overruled if this court elects to change the rule on opening on cross-examination of the opponent's witnesses.

on the assumption that defense witnesses will be called, a defendant could use gamesmanship to achieve a reversal by subsequently refusing to call those witnesses and claiming reversible error on appeal.[12] ***See Griffin v. California***, 380 U.S. 609, 613-614 (1965) (prohibiting

[12]Should the Court elect to change the rule, it should hold explicitly that in such a circumstance a defendant has waived his right to claim error on appeal. In addition, the Court should permit the State to supplement its opening statement after the defendant's opening statement with any discussion of witnesses the defense has then committed himself to call.

prosecutors from commenting on defendant's failure to testify).[13]

And how does the State open on even other defense witnesses, not yet knowing who they are? The defense has heard the State opening and is free to discuss its cross-examination material but the State has not heard the defense opening at the time it opens. Is the State to be permitted the opportunity to supplement its opening once defendant has opened and identified his witnesses? What if defendant changes his mind?

Certainly the original purpose of the opening statement was to introduce the party's case-in-chief--indeed, originally defendant's opening came at the close of the State's case. While defendants are now given the option to open just after the State's opening for reasons of fairness or convenience for the jury, the purpose of the opening has not changed and neither

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[13]In fact, Perrin himself admits that under his proposed system, "prosecutors would be limited in their opening remarks by constitutional considerations, such as those that prevent them from discussing the anticipated proof from the criminal defendant." 48 Emory L.J. at 167. Appellant thus seeks to transform a playing field which offers the same rule for both sides to a field tilted in favor of criminal defendants.

should the rule. Were the rationale to discuss both sides' cases in chief, there would be three openings just as there are three closings.

This is graphically demonstrated by the question of what would happen, under appellant's rule, if the defendant reserved his opening? Does he get to discuss the evidence which came out in the State's case twice, once in an opening at the close of the State's case (even if he intends to call no witnesses of his own) and again in a subsequent closing? In ***U.S. v. Zielie***, 734 F.2d 1447 (11th Cir. 1984), the Court rejected such a theory. The defendant reserved his opening until his case-in-chief, at which time it was apparent that the only witness he intended to call was a co-defendant who would invoke his fifth amendment right and refuse to testify. ***Id***. at 1455. Realistically, the defense would not be presenting any evidence. ***Id***. Defense counsel still wanted to make an opening statement to explain to the jury general points of law. ***Id***. The trial judge denied the request and the Court of Appeals affirmed. ***Id***. To hold otherwise would give the defense in essence two closing arguments at the close of the State's case. ***State of New Mexico v. Gilbert***, 657 P.2d 1165, 1168 (N.M. 1982) (holding that defendant who reserved opening statement and then desired to make an opening but indicated he would not present evidence not entitled to do so because rule is not intended to offer defendant two opportunities to argue to the jury), *citing* ***State v. Fleming***, 523 S.W.2d 849 (Mo. App., St.L.D. 1975). Does appellant contend that defendants who reserve opening have fewer rights than those who do not?

Would the opportunity to discuss prosecution witnesses if and only if defense counsel

opened prior to the prosecution case put pressure on defense attorneys to open then, even at the risk of not yet knowing what evidence, if any, may need to be presented to overcome or rebut the government's evidence? Would it thereby prematurely pressure the defendant's decision on the exercise of his right to testify or not to testify?

The trial court's refusal to permit appellant to make an opening statement based solely on evidence expected to be elicited during cross-examination of the state's witnesses was a permissible action within its discretion, if not a required one. Opening statement based upon evidence adduced during cross-examination usually constitutes argument and thus is an improper comment on the credibility of witnesses. ***Nelson***, 831 S.W.2d at 666-667; ***Hamilton***, 740 S.W.2d at 211. *See also* ***State v. Flaaen***, 863 S.W.2d 658, 660-661 (Mo.App., W.D. 1993); ***State v. Bibbs***, 634 S.W.2d 499, 501 (Mo.App., E.D. 1982); ***State v. Ivory***, 609 S.W.2d 217, 221 (Mo.App., E.D. 1981). It should be evident that "a court is not in a position to determine the extent to which it may properly allow counsel to comment upon the character of a witness or the weight and credibility of his testimony until that witness has testified." ***Hallinan v. United States***, 182 F.2d 880, 885 (9th Cir. 1950).

While appellant would like the Court to believe that argumentative statements could still be excluded under a rule permitting purely factual cross-examination testimony to be discussed,, the reality is that lawyers are likely to push the boundaries of the rule to the point that there are constant comparisons of the two cases (based on alleged "factual statements") prior to the admission of any evidence at all. For example, what happens if the prosecutor elicits the evidence the defendant wanted to elicit on cross-examination in preemptory fashion

on direct? Does the defendant still get to open on such evidence? If so, may the defendant open on all the prosecution evidence? Where and how do we draw the line?

This is all the more true if counsel are permitted to "dirty up" the other side's witnesses before they ever take the stand by discussing impeachment and credibility material. The jury's initial focus will be on the packaging of the lawyers, rather than on the evidence as it comes in. Should such a result obtain, the empirical success the Arizona project documented in keeping jurors from drawing premature conclusions is likely to give way to the types of statistics the appellant cites for mock juries, where instant comparisons are drawn and positions are staked out prior to the evidence, rather than after and based on it. This is not a pathway to greater justice.

Appellant's second point must be rejected.

III.

THE TRIAL COURT DID NOT PLAINLY ERR OR COMMIT MANIFEST INJUSTICE BY NOT INTERVENING *SUA SPONTE* TO PREVENT THE STATE FROM ARGUING THAT THE PAGER FOUND IN APPELLANT'S CAR WAS THE VICTIM'S PAGER TAKEN BY APPELLANT AFTER HE KILLED THE VICTIM SO THAT HE COULD KEEP TRACK OF WHO WAS TRYING TO REACH HER WHILE HE WAS DISPOSING OF THE EVIDENCE OF THE CRIME BECAUSE NO OBJECTION WAS MADE TO THE ARGUMENT AND SUCH CLAIMS ARE USUALLY DENIED WITHOUT EXPLANATION BECAUSE THEY IMPLICATE TRIAL STRATEGY. IN ANY EVENT, THE ARGUMENT WAS PROPER BECAUSE THE STATE WAS PERMITTED TO DRAW REASONABLE INFERENCES FROM THE EVIDENCE AND THE EVIDENCE ESTABLISHED THAT THE VICTIM RELIED UPON THE PAGER BECAUSE SHE LACKED PHONE SERVICE AT THE TIME OF HER DEATH, YET NO PAGER WAS FOUND AT HER HOUSE. MOREOVER, THERE IS NO MANIFEST INJUSTICE IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

Appellant's final point on appeal contends that the trial court plainly erred by failing to intervene *sua sponte* to declare a mistrial when the prosecutor argued that the victim's pager was found in appellant's car and that appellant had it with him so that he could keep track of who was trying to reach the victim as he disposed of the evidence. Appellant admits that there was no objection to any of the argument complained of.

The first portion of the pertinent argument was as follows:

> What about this, this pager? If you look in those

photographs, there was no pager, no pager recovered by Kim Orban. Where was the pager? Well, I don't know. Look at the pictures. That Volvo that they processed, on the floor in the front by the passenger side, there was a pager laying there. Why would he take something like that? What happens when the pager is going off? It starts making noise, right? Who is going to be paging Lynn Thompson? The people who are looking for her. There was no phone service at the house. The pager is how they do it, how they get a hold of her. Again, that's another thing that he removes, just kind of thinks: Oh, I had better get rid of that because I don't want anybody to find her real quick because somebody is going to be looking at her real soon. Again, we have the time frame problem he has.

He takes the pager.

(Tr. 750-751). Appellant also complains of the following portion of the closing argument:

She's due at her mother's house, like she is every other Sunday. She hasn't shown up. He knows that they're counting on her being there and that they're going to miss her as soon as she doesn't show up. He has got to leave the house at seven o'clock. It's past time for her to be there. He has got to move. He has got to get the baby out of there. He has got to get rid of the murder weapon, his shoes, clothes, anything that may have any blood on

it, towels, paper towels, anything like that; he has got to get rid of that stuff and get out of there.

What does he do? He wants to buy as much time as he can. He takes the pager, covers her body, puts the pager in the car, shuts the car door, locks it, runs and takes the child to his sister's. Then he took off. . . .

(Tr. 763-764).

A request for relief from improper argument must be timely made to preserve the issue for appellate review. ***State v. Hicks***, 803 S.W.2d 143, 147 (Mo.App., S.D. 1991). A party cannot fail to request relief, gamble on the verdict, and then, if adverse, request relief for the first time. Id. The Missouri Supreme Court has made it abundantly clear that relief should be granted on an assertion of plain error as to matters involving closing argument only under extraordinary circumstances. ***State v. Kempker***, 824 S.W.2d 909, 911 (Mo. banc 1992); ***State v. McMillin***, 783 S.W.2d 82, 98 (Mo. banc), *cert. denied*, 111 S.Ct. 225 (1990). This is because, absent an objection, it is apparent that defense counsel "considered the remarks inconsequential[,] not warranting objection or as trial strategy ... set the stage for built in error." ***State v. Wood***, 719 S.W.2d 756, 760 (Mo. banc 1986). *See also* ***State v. Matthews***, 790 S.W.2d 271, 272 (Mo.App., E.D. 1990). "Relief should rarely be granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explanation." ***State v. Cobb***, 875 S.W.2d 533, 537 (Mo. banc), *cert. denied*, 513 U.S. 896 (1994), *citing* ***Wood*** at 759. *See*

State v. Kinder, 942 S.W.2d 313, 329 (Mo. banc 1996). Appellate courts also rarely grant plain error relief concerning closing arguments because, "absent objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." ***State v. Hadley***, 815 S.W.2d 422, 423 (Mo. banc 1991). Trial judges should act *sua sponte* only in exceptional circumstances. ***State v. L---R---***, 896 S.W.2d 505, 510 (Mo.App., S.D. 1995).

Appellant's claim is not a proper one for plain error review because it does not establish facially substantial grounds for the court to believe that he has been the victim of manifest injustice. ***State v. Brown***, 902 S.W.2d 278, 284 (Mo. banc), *cert. denied*, 516 U.S. 1031 (1995). Alleged errors by the prosecutor in closing argument justify relief under the plain error standard of review only if they are determined to have had a decisive effect on the jury. ***State v. Sidebottom***, 753 S.W.2d 915, 920 (Mo. banc 1988), *cert. denied*, 488 U.S. 975 (1988). In order for comments made during a closing argument to have had a "decisive effect" on the jury, there must be a reasonable probability that, in the absence of the statements, the verdict would have been different. ***State v. Roberts***, 838 S.W.2d 126, 132 (Mo.App., E.D. 1992).

This Court should therefore deny appellant's claim without explanation. ***Cobb***, 875 S.W.2d at 537; ***Wood***, 719 S.W.2d at 759-760. In the event however that the court considers the claim, *ex gratia*, it is meritless. Even where error is preserved, attorneys are to be given wide latitude in closing argument and may make reasonable inferences from the evidence. ***State v. Coutee***, 879 S.W.2d 762, 766 (Mo.App., S.D. 1994). The prosecutor has the right,

within the limits of closing argument, to provide the state's view on the evidence and the credibility of the witnesses. ***Clemmons v. State***, 785 S.W.2d 524, 530 (Mo. banc), *cert. denied*, 498 U.S. 882 (1990). The prosecutor has the right to argue evidence and reasonable inferences from the evidence. ***State v. Clemons***, 946 S.W.2d 206, 229 (Mo. banc), *cert. denied*, 118 S.Ct. 416 (1997); ***State v. Ward***, 745 S.W.2d 666, 672 (Mo. banc 1988); ***State v. Warrington***, 884 S.W.2d 711, 718 (Mo.App., S.D. 1994). The prosecutor may state a conclusion if that conclusion is fairly drawn from the evidence. ***Clemmons***, 785 S.W.2d at 530; ***Warrington***, 884 S.W.2d at 718.

In the case at bar, the prosecutor made a reasonable inference from the evidence and provided the state's view on the evidence. *See* ***Clemmons*** at 530; ***Ward***, 745 S.W.2d 672; ***Warrington***, 884 S.W.2d at 718. The evidence established that the victim had a pager, which she relied on in lieu of a telephone (Tr. 302-303). The evidence further established that the search of the house after the murder determined that no pager was present. Rather, a pager was found in appellant's car (Tr. 484). No evidence established that appellant, who was unemployed, had a separate pager which he would inexplicitly leave behind in his abandoned car. While the argument that the pager from appellant's car was the victim's missing pager, which she lost after appellant murdered her, and that appellant took the pager to assist his efforts in covering up the crime is not a view mandated by the evidence, it was a reasonable inference for the state to draw in providing its view on the evidence and the reasonable inferences therefrom. Appellant offered no counter-theory as to where the victim's pager went, nor did he argue he owned a separate pager.

The trial court was not obligated to intervene *sua sponte*. This was not an extraordinary circumstance. Defense counsel apparently considered the argument "inconsequential not warranting objection" or as trial strategy sought to build in error in the event of an unfavorable verdict. This court should not countenance such a strategy. Moreover, there was no error. Appellant's final point must be rejected.

CONCLUSION

Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 15752 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 13th day of November, 2001, to:

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